



IT IS SO ORDERED.  
Signed October 18, 2013

A handwritten signature in cursive script that reads "Arthur S. Weissbrodt".

Arthur S. Weissbrodt  
U.S. Bankruptcy

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re	]	Case No. 13-50430-ASW
DENNIS RONALD DI RICCO,	]	Chapter 7
Debtor.	]	
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TISHA S. EFTHYMIU,	]	Adv. Pro. No. 13-05060-ASW
Plaintiff,	]	
v.	]	
DENNIS RONALD DI RICCO,	]	
Defendant.	]	
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**TENTATIVE DECISION AND ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS WITH LEAVE TO AMEND**

Before the Court is the motion of Defendant Dennis Donald Di Ricco, represented by attorney Stephen Finestone, to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), applicable in bankruptcy via Fed. R. Bankr. P. 7012. Plaintiff Tisha Efthymiou, who is represented by attorney Cheryl Rouse, opposes the motion.

1 Defendant previously moved to dismiss Plaintiff's second and  
2 third causes of action under §§ 523(a)(4) and (a)(6). Plaintiff  
3 did not oppose the motion, and the Court dismissed those claims.  
4 Plaintiff filed a First Amended Complaint ("FAC") on August 12,  
5 2013, pleading only one claim under § 523(a)(2)(A). Defendant now  
6 moves to dismiss that claim for failure to state a claim upon which  
7 relief can be granted and for failure to state a fraud claim with  
8 particularity under Fed. R. Civ. P. 9(b).

9 Under Fed. R. Civ. P. 12(b)(6) (applicable in bankruptcy via  
10 Fed. R. Bankr. P. 7012), a court must dismiss a complaint if it  
11 fails to state a claim upon which relief can be granted. To  
12 survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the plaintiff  
13 must allege "enough facts to state a claim to relief that is  
14 plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S.  
15 544, 570 (2007). This standard requires the plaintiff to allege  
16 facts that add up to "more than a sheer possibility that a  
17 defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662,  
18 678 (2009). Plaintiff must provide "more than labels and  
19 conclusions, and a formulaic recitation of the elements of a cause  
20 of action will not do." Id.

21 In deciding whether the plaintiff has stated a claim upon  
22 which relief can be granted, the Court must assume that the  
23 plaintiff's allegations are true and must draw all reasonable  
24 inferences in favor of the nonmoving party. Usher v. City of Los  
25 Angeles, 828 F.2d 556, 561 (9th Cir. 1987).

26 Section 523(a) excepts from discharge any debt:

27 (2) for money, property, services, or an extension,  
28 renewal, or refinancing of credit, to the extent obtained  
by--

(A) false pretenses, a false representation, or

1 actual fraud, other than a statement respecting the  
2 debtor's or an insider's financial condition;

3 To plead a claim under § 523(a)(2)(A), the creditor must  
4 allege that

- 5 (1) the debtor made a representation  
6 (2) the debtor knew the representation was false at the  
7 time he or she made it  
8 (3) the debtor made the representation with the intent to  
9 deceive  
10 (4) the creditor justifiably relied on the  
11 representation, and  
12 (5) the creditor sustained damage as a proximate result  
13 of the misrepresentation having been made.

14 In re Mbunda, 484 B.R. 344, 350 (9<sup>th</sup> Cir. BAP 2012) (citation  
15 omitted). A debtor's failure to disclose material facts  
16 constitutes a fraudulent omission under § 523(a)(2)(A) if the  
17 debtor was under a duty to disclose and possessed an intent to  
18 deceive. In re Apte, 96 F.3d 1319, 1322 (9<sup>th</sup> Cir. 1996.)

19 When pleading these elements, the plaintiff must state "with  
20 particularity the circumstances constituting fraud or mistake.  
21 Malice, intent, knowledge, and other conditions of a person's mind  
22 may be alleged generally." Fed. R. Civ. P. 9(b).

23 The FAC alleges that Defendant was the plaintiff's investment  
24 advisor and accountant. The FAC further alleges that William R.  
25 Michael ("Michael") was a principal in Lancaster Capital  
26 Management, L.L.C. ("Lancaster"), and that Lancaster was and is a  
27 limited liability company engaged in the business of investing  
28 other people's funds. Defendant, Michael, and Lancaster are co-  
defendants in the state court proceeding Tisha A. Efthymiou v.  
William R. Michael, Lancaster Capital Management, LLC, Dennis R. Di  
Ricco, and Does 1-60, Case No. 111CV204158, pending in Santa Clara  
County Superior Court.

1       The FAC further alleges that before October 2007, Plaintiff  
2 was seeking long term capital gains to offset long term capital  
3 losses to provide financial security for Plaintiff, and that  
4 Plaintiff retained Defendant as Plaintiff's financial advisor and  
5 accountant.

6       Plaintiff met with Defendant and Michael in October 2007 to  
7 discuss the possibility of Plaintiff investing with Lancaster  
8 through Michael to invest funds in the foreign exchange market  
9 ("FOREX"). During the meeting, Michael stated that Lancaster's LCM  
10 Gold Fund had been returning an annual profit of 36% with the  
11 result that the investors would receive between 12% and 24% return  
12 depending on the amount of the investment. Lancaster would only  
13 charge a fee if the Lancaster LCM Gold Fund produced a return of  
14 18% per year. Neither Defendant nor Michael provided Plaintiff  
15 with adequate written documentation to support these  
16 representations, nor did Defendant ask for these records or explain  
17 to Plaintiff the risks of relying on summaries.

18       Based on the foregoing representations, in January 2008,  
19 Plaintiff agreed to invest in Lancaster's LCM Gold Fund. Michael  
20 orally agreed to a return of 24% per year payable at 2% each month  
21 with a catch-up provision. If the return was greater than 24%,  
22 Lancaster would keep it. If less, Lancaster would receive nothing.  
23 The oral agreement also had a loss cap provision that if at any  
24 time 20 percent of the principal was lost by Lancaster, all  
25 investment activity would cease and Plaintiff would be notified.  
26 Plaintiff had the right to full or partial liquidation upon 30  
27 days' notice. Defendant attended the meeting but did not warn  
28 Plaintiff about Lancaster or Michael and made no mention of the

1 risks inherent in such an investment. Plaintiff alleges Defendant  
2 sent multiple emails to Plaintiff encouraging her to invest with  
3 Lancaster. Despite promises of written contracts, no such  
4 contracts were ever presented to Plaintiff by Lancaster, Michael,  
5 or Defendant.

6 On February 1, 2008, Plaintiff transferred \$750,000 to  
7 Lancaster with specific instructions by Plaintiff and Defendant  
8 that the investments were to be used only for FOREX trading.  
9 However, unbeknownst to Plaintiff, Michael transferred \$150,000.00  
10 of Plaintiff's money to pay off a previous investment made with  
11 Michael's partner, Bruce Musgrave, in an investment unrelated to  
12 Plaintiff.

13 Beginning in March 2008, Plaintiff received monthly transfers  
14 into her account from Lancaster equal to a 2% monthly return on her  
15 principal, totaling \$162,000.00. Because of this apparent success,  
16 Plaintiff invested another \$480,000.00 in October of 2008, \$530,000  
17 in November 2008, and \$70,000 in April 2009.

18 Michael loaned all of Plaintiff's remaining funds to Lancaster  
19 Platinum Growth Fund ("LPGF"), a hedge fund operated by Lancaster  
20 and Michael. LPGF invested in and traded futures, purchased stock  
21 options and invested in Icon, Taurus and EIMT. LPGF also loaned  
22 \$250,000 of Plaintiff's investment to Enviromatix of California,  
23 Inc., a company on which Defendant serves as a registered agent and  
24 as a member of the board of directors. Plaintiff alleges Defendant  
25 had a financial interest in the company.

26 Furthermore, LPGF loaned \$180,000.00 of Plaintiff's investment  
27 to Cyrotherm of California, inc., a company for which Defendant  
28 serves as president and as a member of the board of directors, and

1 in which Plaintiff alleges Defendant has a financial interest.  
2 Plaintiff also alleges that Defendant knew of these loans but did  
3 not disclose the information to Plaintiff.

4 LPGF made a final investment of Plaintiff's money to Art Loan  
5 Financial Services, Inc. in the amount of \$500,000.00. Michael  
6 served on the board of directors of Art Loan Financial Services.  
7 Plaintiff alleges she had neither given consent to these  
8 investments, nor did she have knowledge of these investments.

9 Between February 2008 and July 2009, Michael and Defendant  
10 gave oral and written assurances to Plaintiff that her funds were  
11 invested in the FOREX market and were doing well. Michael knew  
12 this was false. No later than March 2008, Defendant became aware  
13 that Plaintiff's money had been placed with LPGF instead of being  
14 traded in the FOREX market in LCM Gold, and that it had incurred  
15 financial losses. Defendant did not inform Plaintiff. Plaintiff  
16 alleges that Defendant advised Michael and Lancaster to keep secret  
17 from Plaintiff the fact that her funds had not been invested in the  
18 FOREX market or that Plaintiff had sustained substantial losses.  
19 Instead, Defendant advised Michael to continue to make monthly  
20 payments to Plaintiff. Defendant and Michael did not admit to  
21 Plaintiff that her funds had been transferred to the LPGF hedge  
22 fund until October of 2010.

23 Plaintiff learned for the first time in July 2009 that her  
24 funds had not been invested in FOREX trading but had been loaned to  
25 LPGF and that there had been a significant loss of funds - in  
26 excess of the 20% loss cap - going back a significant period of  
27 time. All Plaintiff's funds had either been lost or were committed  
28

1 to troubled, illiquid investments and as a practical matter were  
2 lost.

3 Plaintiff was paid \$3,300.00 each month from August 2009-May  
4 2010. After May 2010, Plaintiff received nothing. In January  
5 2010, Plaintiff and Defendant met with Michael to audit the books  
6 and records concerning Plaintiff's investment. The audit confirmed  
7 that Plaintiff's funds had not been traded in the FOREX market but  
8 had been utilized by Michael as alleged above.

9 Plaintiff's allegations that are specific to the  
10 § 523(a)(2)(A) claim are as follows:

11 21. In advising the Plaintiff to invest with Michael  
12 and Lancaster, Di Ricco concealed that such a promised  
13 return on FOREX trading was unlikely, that he had not and  
14 would not review Lancaster's records to confirm that it  
15 was generating or would generate the returns promised by  
16 Michael and Lancaster, that agreements should be in  
17 writing, and beginning no later than March, 2008  
18 concealed from the Plaintiff that Lancaster had given the  
19 money to LPGF a hedge fund that had made questionable  
20 loans and investments and that Plaintiff was not making  
21 money as indicated in the monthly payments she was  
22 receiving, but in fact was losing money. Di Ricco  
23 concealed that he had a financial interest in two of the  
24 companies to which loans were made by LPGF. Michael  
25 concealed that he had a financial interest in one of the  
26 companies to which a loan was made by LPGF.

27 22. The facts represented and the facts concealed  
28 were material. Plaintiff reasonably believed the facts as  
represented to her as true. If the true facts had not  
been concealed from her, Plaintiff would not have  
invested her funds with Michael and Lancaster, would have  
diversified, would have monitored the investments, and  
would have pulled out her remaining investment, all to  
her damage as herein alleged.

23 23. As a direct and legal result of the fraudulent  
24 concealment by Di Ricco, Plaintiff has been damaged in  
25 the sum of not less than \$2,349,000 representing her net  
26 principal investment, as well as pre-judgment interest at  
27 the rate of 10 percent per annum from January 1, 2009 to  
28 the present.

24 24. In addition, with respect to the representations  
25 made by Di Ricco, he knew them to be false and made these  
26 representations with the intention to induce Plaintiff to

1 act in reliance on these representations in the manner  
2 hereafter alleged, or with the expectation that Plaintiff  
3 would so act. Di Ricco also ratified and approved the  
false representations made by Michael.

4 25. Plaintiff, at the time these representations  
5 were made by and at the time Plaintiff took the actions  
6 herein alleged, was ignorant of the falsity of the  
representations and believed them to be true. In reliance  
on these representations, Plaintiff was induced to invest  
the sum of \$1,830,000 in Lancaster.

7 26. Had Plaintiff known the actual facts, she would  
8 not have taken such action. Plaintiff's reliance on Di  
9 Ricco's representations was justified because of Di  
Ricco's role as her accountant and financial advisor.

10 Defendant argues that the only affirmative representation  
11 alleged is that between February 2008 and July 2009 Defendant  
12 assured Plaintiff that her funds were invested in the FOREX market  
13 and were doing well. Plaintiff alleges that this allegation is not  
14 pleaded with particularity as required by Fed. R. Civ. P. 9(f).

15 To satisfy Fed. R. Civ. P. 9, a complaint should plead the  
16 who, what, where, when, why and how. Cooper v. Pickett, 137 F.3d  
17 616, 627 (9<sup>th</sup> Cir. 1995). The complaint also must identify "the  
18 circumstances of the alleged fraud so that defendants can prepare  
19 an adequate answer." Id. (citing Warshaw v. Xoma Corp., 74 F.3d  
20 955, 959-60 (9<sup>th</sup> Cir. 1996)). Defendant is correct that the  
21 allegation does not meet the Fed. R. Civ. P. 9 standard. Although  
22 the who and what are stated clearly, there is no allegation of the  
23 precise time, place or reason for the representations. Further,  
24 Defendant correctly points out that to the extent the  
25 representations were made after Plaintiff made her final  
26 investment, those representations cannot be a basis for an  
27 allegation that Plaintiff was induced by those representations into  
28 investing more funds.



1 Defendant acknowledges that fraudulent concealment may form a  
2 basis for a claim under § 523(a)(2)(A) but argues that the  
3 complaint still does not state a claim upon which relief can be  
4 granted. First, Plaintiff alleges that Defendant concealed that  
5 the promised returns on FOREX trading were unlikely. However,  
6 there is no allegation that Defendant knew that this was the case.  
7 Second, Plaintiff alleges that Defendant concealed that he had not  
8 and would not review Lancaster's records to confirm that it was  
9 generating or would generate the returns promised by Michael and  
10 Lancaster. Here, there is no allegation that Defendant had a duty  
11 to perform such a review or that a failure to do so was more than  
12 mere negligence. Third, Plaintiff alleges that Defendant concealed  
13 that agreements between Plaintiff and Lancaster should be in  
14 writing. Again, there is no allegation that Defendant had a duty  
15 to inform Plaintiff of this or that failure to do so was anything  
16 but negligent.

17 Fourth, Plaintiff alleges that Defendant concealed from  
18 Plaintiff that Lancaster had given the money to LPGF, a hedge fund  
19 that had made questionable loans and investments, and Plaintiff was  
20 not making money as indicated in the monthly payments she was  
21 receiving, but was in fact losing money. Defendant argues that the  
22 allegation is unclear, but when read in conjunction with the  
23 allegation that Defendant knew no later than March 2008 that  
24 Plaintiff's money had been placed with LPGF, the Court finds that  
25 the allegation is sufficient to support elements one and two - that  
26 the Defendant made a representation that he knew to be false.

27 Finally, Plaintiff alleges that Defendant concealed that he  
28 had a financial interest in two of the companies to which loans

1 were made by LPGF. Defendant argues that this allegation is  
2 insufficient because it does not state when the alleged loans were  
3 made or when Defendant learned of the loans. In his reply  
4 Defendant also argues that the corporations to which the loans were  
5 made were not incorporated until 2009, after Plaintiff had made her  
6 investments, although the Court does not find this dispositive.

7 The Court finds that this allegation is not pleaded with  
8 particularity and thus does not support a claim under  
9 § 523(a)(2)(A). As argued by Defendant, there is no allegation as  
10 to when the loans were made or when Defendant learned of those  
11 loans.

12 The Court also finds that there is no allegation that  
13 Defendant acted with the requisite intent to deceive. The FAC  
14 alleges that Defendant made the representations with the intent to  
15 induce Plaintiff to act in reliance on these representations, but  
16 does not explicitly state that Defendant acted with intent to  
17 deceive.

18 For the foregoing reasons, the motion to dismiss is granted,  
19 with leave to amend.

20 IT IS SO ORDERED.

21 \*\*\* END OF TENTATIVE DECISION AND ORDER \*\*\*  
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Court Service List

All parties are ECF participants